

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPETITIVE PRODUCT PRICES
GLOBAL RESELLER EXPEDITED PACKAGE CONTRACTS
NEGOTIATED SERVICE AGREEMENTS

Docket No. MC2013-64

COMPETITIVE PRODUCT PRICES
GLOBAL RESELLER EXPEDITED PACKAGE CONTRACTS 3
(MC2013-64)
NEGOTIATED SERVICE AGREEMENT

Docket No. CP2013-84

**RESPONSE OF THE UNITED STATES POSTAL SERVICE
IN OPPOSITION TO MOTION FOR ACCESS TO NON-PUBLIC MATERIALS**
(April 3, 2014)

The United States Postal Service hereby responds in opposition to the Motion of Mark Jamison Requesting Access to Non-Public Materials (hereinafter "Motion"), filed March 31, 2014.¹ For the reasons discussed below, the Motion should be denied.

Non-Public Materials Sought Are Highly Confidential

The materials being sought are highly confidential and commercially sensitive, as outlined in the Postal Service's Application for Non-Public Treatment initially filed in Docket Nos. MC2013-64 and CP2013-84.² The non-public materials at issue consist of

¹ Motion of Mark Jamison Requesting Access to non-Public Materials, Docket Nos. MC2013-64 and CP2013-84, March 31, 2014.

² The Postal Service herein incorporates by reference its arguments, and the identified harms that would come from disclosure of these materials, that are contained in the Postal Service's Application for Non-Public Treatment in this docket. See Request of the United States Postal Service to Add Global Reseller Expedited Package Contracts 3 to the Competitive Products List and Notice of Filing a Global Reseller Expedited Package 3 Negotiated Service Agreement, Docket Nos. MC2013-64 and CP2013-84, September 30, 2013, at Attachment 1, which is available at <http://prc.gov/Docs/87/87987/MC2013-64,%20CP2013-84%20GREP%203%20Notice.pdf>.

negotiated prices and terms in the contract, as well as the financial data and workpapers filed in support of the contract. In the Postal Service's view, these materials are information of a commercial nature, which under good business practice would not be publicly disclosed. This information would be exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3), (b)(4). Moreover, this information is highly confidential within the broader shipping services market. Disclosure would cause a clear commercial injury to the Postal Service and the agreement's counterparty.

These views are shared by the contractholder to the agreement that is the subject of Docket Nos. MC2013-64 and CP2013-84 ("Counterparty"). In the letter included as Attachment 1, the Counterparty strongly opposes the Motion and wishes to maintain its confidential status. In addition, the letter states that "disclosure of the other highly confidential, commercially sensitive information sought by Mr. Jamison would unfairly and inappropriately place" the Counterparty "at significant competitive disadvantage." Furthermore, the Counterparty affirms that the redacted information "is among the most protected, sensitive business information in any vendor-supplier relationship."³

Unlike its competitors, the Postal Service is required to provide these commercially sensitive materials to the Commission in order to meet the statutory standards outlined in 39 U.S.C. § 3633. Even the redacted material that is filed publicly with the Commission reveals more information than the Postal Service's competitors typically disclose about their own contracts or other commercially sensitive business arrangements. Without the confidentiality protections provided by the Commission's

³ See Attachment 1, Letter from Douglas to Cooper.

rules, the Postal Service's competitors could utilize these sensitive materials to gain a competitive advantage in the marketplace, to the detriment of the Postal Service. Other prospective Counterparties could use this information to negotiate more favorable prices or terms in future contracts, which would mitigate the increase in contribution the Postal Service would receive from these contracts. The Postal Service considers both of these scenarios to be highly likely to occur, if any of these confidential contract materials were disclosed publicly.

Finally, the disclosure of the requested non-public materials could have a significant negative effect on the Postal Service's competitive contract business as a whole, as well as the Postal Service's ability to compete in the shipping services market. The growth of the Postal Service's shipping services business in recent years is a direct result of the successes that the Postal Service has had in entering into contracts with mailers for competitive products, including Global Reseller Expedited Package Contracts. Simply put, the Postal Service would not be able to retain all of its current competitive products contracts, or add new Counterparties in the future, if mailers and resellers were not confident that the contract prices, key terms, and related financial materials would remain confidential in matters before the Commission. Disclosure of the non-public materials in the instant docket could have far-reaching effects on the Postal Service's shipping services business, and ultimately, its overall financial health.

Mr. Jamison's Motion Fails to Meet the Threshold Required by 39 C.F.R. § 3007.50(a)(1)

Under 39 C.F.R. § 3007.50(a)(1), requests for access to non-public materials must contain “[a] detailed statement providing justification for access, including reference to the materials’ relevance to compliance under chapter 36 of title 39 of the U.S. Code.”

The Motion provides several justifications why access should be granted.

The first justification provided in the Motion is that the request is “for the purpose of conducting an independent evaluation of the contract to determine if its meets the terms and conditions asserted by the Postal Service in its filing.”⁴ The Motion was filed in Docket Nos. MC2013-64 and CP2013-84, the same dockets in which the Postal Service filed a contract on September 30, 2013.⁵ On October 18, 2013, the Commission, in Order No. 1850, requested comments concerning that contract no later than October 25, 2013.⁶ On November 7, 2013, the Commission completed its review of the contract. Specifically, in Order No. 1870, the Commission stated that “[b]ased on its review of the statement and an analysis of the supporting data, the Commission finds that the Agreement comports with the provisions applicable to rates for competitive products in 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7.”⁷ The Motion includes a

⁴ Motion of Mark Jamison Requesting Access to non-Public Materials, Docket Nos. MC2013-64 and CP2013-84, March 31, 2014, at 1.

⁵ Request of the United States Postal Service to Add Global Reseller Expedited Package Contracts 3 to the Competitive Products List and Notice of Filing a Global Reseller Expedited Package 3 Negotiated Service Agreement, Docket No. MC2013-64 and CP2013-84, September 30, 2013.

⁶ PRC Order No. 1850, Notice and Order concerning Filing of Global Reseller Expedited Package Contracts 3 Negotiated Service Agreement, Docket Nos. MC2013-64 and CP2013-84, October 18, 2013, at 4.

⁷ PRC Order No. 1870, Order Adding Global Reseller Expedited Package Contracts 3 to the Competitive Product List and Approval of Designation as Baseline Agreement, Docket Nos. MC2013-64 and CP2013-84, November 7, 2013, at 5-6.

request to independently review the Commission's findings in Docket Nos. MC2013-64 and CP2013-84, concerning a contract with twelve-month duration. The Motion was filed more than five months after October 25, 2013, the date established by the Commission for the submission of comments in these dockets. As a result, the Motion is not timely, and therefore should be denied.

The second justification provided in the Motion is that the request is "in preparation for a review pursuant to 39 [U.S.C.] § 3653, specifically the 2013 ACR but also in connection with a review of material that will be related to the 2014 ACR."⁸ The Commission will have an opportunity to examine the contract that is the subject of Docket Nos. MC2013-64 and CP2013-84 each year that it is in effect, as part of the Postal Service's annual compliance review (ACR), under 39 U.S.C. § 3653. Section 3653 provides an opportunity for users of the mail to comment during the ACR process, but leaves the ultimate compliance determination up to the Commission. As for the FY2013 ACR process, according to Commission Order No. 1935, comments were due on or before January 31, 2014.⁹ On March 27, 2014, the Commission issued its Annual Compliance Determination Report in Docket No. ACR2013.¹⁰ Because the effective date of the agreement that is the subject of this docket was December 1, 2013,¹¹ approximately two months after the end of fiscal year 2013, the FY 2013 ACR does not contain information concerning the agreement that is the subject of this docket. As a

⁸ Motion of Mark Jamison Requesting Access to non-Public Materials, Docket Nos. MC2013-64 and CP2013-84, March 31, 2014, at 1.

⁹ PRC Order No. 1935, Notice of Postal Service's Filing of Annual Compliance Report and Request for Public Comments, Docket No. ACR2013, December 30, 2013, at 6.

¹⁰ U.S. Postal Regulatory Commission, *Annual Compliance Determination Report Fiscal Year 2013*, Docket No. ACR2013, March 27, 2014.

¹¹ United States Postal Service Response to Order No. 1870 concerning Effective Date of a Global Reseller Expedited Package Contracts 3 Negotiated Service Agreement, Docket Nos. MC2013-64 and CP2013-84, November 25, 2013.

consequence, the agreement is not subject to review in Docket No. ACR2013. Also, if Mr. Jamison is seeking information concerning the FY2014 ACR process, the Commission should deny the Motion as unnecessary and premature,¹² as that fiscal year that is the subject of that docket has not even concluded.¹³

The third justification provided is an intention “to seek access to sealed material in several Commission proceedings for the purpose of reviewing compliance with not only 39 [U.S.C.] § 3642 but also provisions related to CFR 39 §3007.20, specifically what material and how much material is given preferential sealed treatment.”¹⁴ As stated previously, the Motion was filed more than five months after October 25, 2013, the date established by the Commission for the submission of comments concerning the agreements that are the subject of the dockets in which the Motion was filed. Also, FY2013 ACR does not contain information concerning the agreement that is the subject of this docket. If the Motion is to be interpreted as concerning FY2014 ACR, the Motion is unnecessary and premature. Therefore, the Motion is not timely, and therefore should be denied.

¹² In PRC Order No. 1985, the Commission ruled, concerning a previous motion by Mr. Jamison, that “in the absence of any current compliance issue relevant to Parcel Select and Parcel Return Service Contract 5, the Motion is denied as premature.” PRC Order No. 1985, Order Denying Motion Requesting Access to Non-Public Materials, Dockets Nos. MC2014-1 and CP2014-1, February 7, 2014, at 7. The Motion filed in Docket Nos. MC2013-64 and CP2013-84, on page 1, acknowledges this Commission ruling. Motion of Mark Jamison Requesting Access to non-Public Materials, Docket Nos. MC2013-64 and CP2013-84, March 31, 2014, at 1.

¹³ Furthermore, the PRC’s annual compliance review determination process, pursuant to 39 U.S.C. § 3653(b), involves the Commission making a “written determination as to – (1) whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder); or (2) whether any service standards in effect during such year were not met.” As for international negotiated service agreements, the focus of the ACR process concerns historical financial information during the fiscal year. Neither the Commission nor any interested person needs access to the redacted terms of the contract to evaluate any negotiated service agreement’s compliance with the applicable pricing criteria. Consequently, the Postal Service opposes Mr. Jamison’s request to the extent that he might seek access to the sealed portions of the contract for purposes of the next annual compliance review.

¹⁴ Motion of Mark Jamison Requesting Access to non-Public Materials, Docket Nos. MC2013-64 and CP2013-84, March 31, 2014, at 2.

The Motion includes a reference to Section 3653, in an apparent attempt to justify access to the non-public materials, but this is not an adequate reason to allow access in this case. If a vague reference to the ACR process were a sufficient justification, seemingly any party could request access on the same grounds, for any competitive contract before the Commission. The Motion also implies that access is justified in order to ensure that the Postal Service's public description of the materials aligns with the non-public materials themselves. Surely the Commission's rules intend for the standard for access to such commercially sensitive materials to be much higher.

The fourth reason provided in the Motion is that Mr. Jamison "will be looking at issues related to 39 [U.S.C.] §101(b)."¹⁵ The Motion's brief reference to 39 U.S.C. § 101(b) does not provide a compelling justification for access to the non-public materials at issue. It is not clear that Mr. Jamison is alleging any statutory violation concerning 39 U.S.C. § 101(b), in relation to the individual contract that is the subject of Docket Nos. MC2013-64 and CP2013-84. That contract concerns rates and services that are "not of general applicability," 39 U.S.C. § 3632(b)(3), and involves products that are competitive within the meaning of 39 U.S.C. § 3633. The Motion does not explain how disclosure of these confidential materials would help Mr. Jamison make these arguments in either an annual compliance review proceeding under Section 3653, or a complaint case under Section 3662. Any reasonable interpretation of the Commission's confidentiality rules must require a much more detailed statement justifying access to such highly confidential materials. Simply citing a few statutory provisions, and implying that access to confidential materials may aid in an "independent evaluation" of the contract, cannot be an adequate justification for disclosing these materials.

¹⁵ *Id.* at 2.

Mr. Jamison's Motion Fails to Meet the Threshold Required by 39 C.F.R. § 3007.50(a)(2)

Under 39 C.F.R. § 3007.50(a)(2), requests for access to non-public materials must contain “[a] list of relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the party requesting access, and whether that party is affiliated with the delivery services, communications or mailing industries.”

The Motion filed in Docket Nos. MC2013-64 and CP2013-84 mentions that Mr. Jamison contributes “reporting and commentary” to the website, www.savethepostoffice.com.¹⁶ Some additional information was provided concerning Mr. Jamison in an opposition filed by another party in Docket Nos. MC2014-1 and CP2014-1.¹⁷

Conclusion

In its *Annual Compliance Determination Report Fiscal Year 2013*, the Commission stated that “Commission rules concerning the protection of non-public information are intended to strike an appropriate balance between public access to information and the commercial interests of the Postal Service and its partners or customers,” citing Docket No. RM2008-1, Order No. 194, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March

¹⁶ *Id.* at 3.

¹⁷ Opposition of Amazon Fulfillment Services, Inc., to Motion of Mark Jamison Requesting Access to Non-Public Materials, Docket Nos. MC2014-1 and CP2014-1, November 27, 2013, at 3-4.

20, 2009.¹⁸ Ultimately, the Commission must balance the potential harm that would come from the disclosure of these commercially sensitive materials, against the stated reasons for disclosure. As detailed above, the materials at issue in this case are highly confidential, both to the Postal Service and its Counterparty. Disclosure would not only cause immediate commercial injury to the Postal Service and its contract partner in the short term, but it would also have a significant chilling effect on the Postal Service's ability to compete in the shipping services market with future competitive contracts. The Postal Service submits that the Motion fails to meet the threshold required by 39 C.F.R. § 3007.50(a)(1) and is not timely filed in relation to Docket Nos. MC2013-64 and CP2013-84. As for Docket No. ACR2013, the Motion is not timely filed and FY 2013 ACR does not contain information concerning the agreement that is the subject of this docket. Also, the Motion is unnecessary for, and premature in relation to the FY2014 ACR process. Furthermore, the Motion does not provide any compelling justification for obtaining access to these materials sufficient to outweigh the likely commercial injury to the Postal Service and its Counterparty. Therefore, the Motion should be denied.

¹⁸ U.S. Postal Regulatory Commission, *Annual Compliance Determination Report Fiscal Year 2013*, Docket No. ACR2013, March 27, 2014, at 98.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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April 3, 2014

BY EMAIL

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Re: Priority Mail Express and Priority Mail Contract (MC2014-3, CP2014-3)
Global Reseller Agreement (MC2013-64, CP2013-84)

Dear Mr. Cooper:

We represent the counterparty (the “Counterparty”) to United States Postal Service (“USPS”) Priority Mail Express and Priority Mail Contract 15 (Docket Nos. MC2014-3 and CP2014-3) and Global Reseller Expedited Package Contract Agreement (Docket Nos. MC2013-64 and CP2013-84) (collectively the “Agreements”). On April 1, 2014, the USPS advised my client that the previous day a Mr. Mark Jamison filed two motions (the “Motions”) with the Postal Regulatory Commission (the “PRC”) requesting access to the Agreements and other non-public materials in the PRC dockets.

You have advised the Counterparty that any opposition is due on April 3, 2014. We understand that the USPS intends to file an opposition (the “Opposition”) to Mr. Jamison’s Motions. Please be advised, however, that given the limited notice afforded the Counterparty, it will not be able to prepare and file its own opposition. Nevertheless, my client strongly supports USPS’s Opposition to the Motions.

As you know, in order to protect its competitive position, the Counterparty has not been identified in the publicly-available docket materials. For the reasons previously stated in connection with the original submission of these materials to the PRC, my client wishes to maintain its confidential status.

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Richard T. Cooper, Esq.
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I am also writing to confirm the Counterparty's position that disclosure of the other highly confidential, commercially sensitive information sought by Mr. Jamison would unfairly and inappropriately place my client at significant competitive disadvantage. The Counterparty incorporates by reference all previously stated reasons regarding the need for this confidential treatment. The Agreements are negotiated contracts between my client and USPS for the provision of products and services. The terms of the Agreements are highly confidential and are not known within the broader retail market. Those terms, which are contained in the non-public versions of the Agreements and other file documents Mr. Jamison seeks, include competitively significant, sensitive commercial information concerning the Agreement's terms and conditions, including specific price terms, incentive arrangements, and volume requirements (among others). This information is among the most protected, sensitive business information in any vendor-supplier relationship. The Agreements also contain confidential information concerning the scope of the relationship, my client's shipping profile, and the products and services offered thereunder. These terms are inherently commercially sensitive and were intended to remain confidential between the parties. Indeed, the Agreements expressly required the USPS to seek confidential treatment for customer-specific information contained in the Agreements, which the USPS appropriately did do and which the PRC appropriately granted.

Disclosure of this highly confidential and commercially sensitive information would competitively harm my client. Competitors could use such information to evaluate revenues and profitability associated with my client's provision of certain products and services. Disclosure could enable my client's competitors to gain an unfair competitive advantage in offering a more advantageous contract to USPS on more favorable financial or other terms. Competitors also could use the information to compete unfairly with my client with respect to other contracts that my client has in place, and may use the information to hinder if not thwart the ability of my client to secure future contracts.

Accordingly, my client strongly opposes Mr. Jamison's motions for access to non-public information with respect to the Agreements. The Counterparty also authorizes you to include or refer to this correspondence in USPS's responses in opposition to Mr. Jamison's motions.

Very truly yours,



Philip Le B. Douglas

cc: Christopher C. Meyerson, Esq. (by email)